

Sustainable Development Law & Policy

Volume 20
Issue 1 Fall 2019: *Comparative International
Approaches to Environmental Challenges*

Article 6

State Preemption and Single Use Plastics: Is National Intervention Necessary?

Ethan D. King
American University Washington College of Law

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/sdlp>



Part of the [Agriculture Law Commons](#), [Constitutional Law Commons](#), [Energy and Utilities Law Commons](#), [Environmental Law Commons](#), [Food and Drug Law Commons](#), [Health Law and Policy Commons](#), [Human Rights Law Commons](#), [Intellectual Property Law Commons](#), [International Law Commons](#), [International Trade Law Commons](#), [Land Use Law Commons](#), [Law and Society Commons](#), [Law of the Sea Commons](#), [Litigation Commons](#), [Natural Resources Law Commons](#), [Oil, Gas, and Mineral Law Commons](#), [Public Law and Legal Theory Commons](#), and the [Water Law Commons](#)

Recommended Citation

King, Ethan D. (2019) "State Preemption and Single Use Plastics: Is National Intervention Necessary?," *Sustainable Development Law & Policy*. Vol. 20 : Iss. 1 , Article 6.
Available at: <https://digitalcommons.wcl.american.edu/sdlp/vol20/iss1/6>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Sustainable Development Law & Policy by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

STATE PREEMPTION AND SINGLE USE PLASTICS: IS NATIONAL INTERVENTION NECESSARY?

By Ethan D. King*

Climate change and plastic waste are systemic issues facing our world today.¹ States have divergent practices concerning the regulation of single use plastic; some states have passed preemption statutes preventing municipalities from making single use plastic regulations while others are enacting laws banning types of single use plastics.² Single use plastic materials are goods that are distributed, sold, and utilized across state lines. As a result, Congress has the ability to regulate single use plastics. In doing so, Congress performs a valuable service to protect the public health and the environment.

STATE REGULATIONS AND MUNICIPAL REGULATIONS OF SINGLE USE PLASTICS

There are massive environmental and economic repercussions stemming from our reliance of single use plastics.³ In an attempt to recognize the need for recycling, Colorado passed a law in 1993, stipulating that “No unit of local government shall require or prohibit the use or sale of specific types of plastic materials or products or restrict or mandate containers, packaging, or labeling for any consumer product”.⁴ Notably, Colorado’s law does not mention single use plastic bags.⁵ However more recently, states like Oklahoma, North Dakota, Texas, Idaho, and Florida, have passed laws preempting municipalities’ ability to regulate plastics, preventing such them from enacting plastic bans, fees, or recycling programs not otherwise issued by the state.⁶ Other states such as New York and Maine have passed laws requiring stores that use plastic bags to have plastic bag recycling centers outside of the places of business.⁷ Currently, there are fourteen states that have preemption laws regarding plastic regulation, and eight states have statewide legislation furthering a goal of plastic reduction and recycling efforts.⁸ This still leaves the majority of the United States without a law on the books favoring state preemption or plastic waste reduction.⁹

Unsurprisingly, then, municipalities in states that have not adopted such preemption statutes are now experiencing greater success in regulating single use plastics.¹⁰ Take, for example, Santa Cruz, California, the first city to ban the use of mini-hotel shampoos bottles.¹¹ Other such municipalities’ have instituted plastic bag fees or plastic straw bans to cut down waste.¹² Responding to environmental and economic pressures, the legislatures of New York and California are pushing for statewide prohibitions on certain types of plastic materials.¹³ California recently passed a bill which will prohibit hotels in the state from providing mini shampoo and lotion bottles, and the ban shall take effect beginning in 2023.¹⁴

COURTS ARE AWAITING A LEGISLATIVE CHANGE

Courts in Florida and Texas have ruled against municipal plastic bag bans, specifically citing to the preemption statutes.¹⁵ Even with Colorado’s preemption statute, the city of Aspen has continued to operate a plastic bag fee.¹⁶ In court, the petitioners argued that the bag fee was a tax, and the citizens of the city were not allowed to vote; therefore, a tax could not be enforced.¹⁷ The Supreme Court of Colorado disagreed, and ruled that the bag fee was a fee, not a tax, which is how the fee has survived and is still in practice today.¹⁸ The preemption law in Colorado has never been formerly challenged and environmental activists have been weary to ask for more regarding plastic regulations until the state legislation repeals the preemption law.¹⁹

WHY CAN CONGRESS STEP IN, AND WHEN IT HAS DONE SO IT BEFORE

States preemption laws are preventing groups that want to protect the health of their citizens and the environment.²⁰ By advancing bans of single use plastics, states are inviting interstate commerce issues.²¹ Congress can step in and enact federal legislation of single use plastics due to its Commerce Clause powers.²² Congress has minimized environmental discrepancies among the states before and passed acts like the Safe Drinking Water Act (SDWA) and the Microbeads Free Water Act (MFWA).²³

The development of the SDWA stemmed a realization of the need for water quality and from states relaxing their laws on water quality after getting rid of certain waterborne diseases like cholera and typhoid.²⁴ As a result, some states who found their water quality sufficiently safe did not closely monitor water quality, while others continued to invest in their water quality infrastructure.²⁵ Without uniform standard for states water quality, the public health of citizens was jeopardized.²⁶ The SDWA came in to set minimum nation-wide contaminant levels to solve the gap of water quality and safety.²⁷

The MFWA began as a state issue, with a number of states electing to ban the sale of microbead products.²⁸ Recognizing the lack of uniformity in the laws regulating microbead products, Congress stepped in in to create uniformity through its Commerce Clause power.²⁹ The MFWA is a great example of Congress addressing disparities in state public health protections by utilizing its power granted by the Commerce clause.³⁰

*Joint J.D./M.B.A Candidate, American University Washington College of Law 2020

CONCLUSION

Regulation of single use plastics also falls under the purview of the Commerce Clause. Congress can and should step in to protect public health by creating federal legislation to ban single use plastics. Such a bill would create a floor of minimum plastic

standards and give states the ability to make improved laws to combat climate change and reduce plastic waste. While such a ban would not solve the plastic problem in its entirety, it is a step in the right direction helping the United States phase out its reliance on single use plastic materials.



ENDNOTES

¹ See generally *Our planet is drowning in plastic pollution*, UN ENV'T PROGRAMME <https://www.unenvironment.org/interactive/beat-plastic-pollution/> (Last visited Oct. 27, 2019) (explaining that the proliferation of plastics is due to societies increased dependence on them).

² See *Infra*, note 6.

³ See *Fact Sheet: Single-Use Plastics*, EARTH DAY NETWORK (Mar. 29, 2018), <https://www.earthday.org/2018/03/29/fact-sheet-single-use-plastics/> (examining the impact that single-use plastics have on the environment); Danielle Chiriguayo, *The Single Use Plastic Pollution Problem*, MARKETPLACE (Apr. 22, 2019), <https://www.marketplace.org/2019/04/22/single-use-plastic-pollution-problem/> (exploring the economic impact that single-use plastics have); Kyle Kuphal, *Plastic Bags No Longer Allowed in Recycling*, PIPESTONE CTY. STAR (Oct. 2, 2019), <https://www.pipestonestar.com/articles/plastic-bags-no-longer-allowed-in-recycling/> (examining the lack of market for plastic bags in recycling).

⁴ COLO. REV. STAT. § 25-17-104 (2017); see also Tamara Chuang, *Colorado's Ban on Banning Plastics has Cities' Plans to Outlaw Single-Use Bags and Straws in Limbo*, COLO. SUN (Mar. 7, 2019), <https://coloradosun.com/2019/03/07/colorado-plastic-ban-law-cities/>.

⁵ See § 25-17-104 (2017).

⁶ See OKLA. STAT. ANN. tit. 27A § 2-11-504 (West 2019); FLA. STAT. § 403.7033 (2008); N.D. CENT. CODE § 23.1-08-06.1 (2019); IDAHO CODE § 67-2340 (2016); TEX. HEALTH & SAFETY CODE ANN. § 361.0961(a)(1) (West 1993); Julia Ingram, *Cities are Stymied in Banning Plastics — and the State is Doing Nothing About It, They Say*, MIAMI HERALD, (Aug. 22, 2019), <https://www.miamiherald.com/news/local/environment/article234158642.html>.

⁷ See *State Plastic and Paper Bag Legislation*, NAT'L CONF. ST. LEGISLATURES, (Nov. 1, 2019) <http://www.ncsl.org/research/environment-and-natural-resources/plastic-bag-legislation.aspx> (bulleting acts the various acts passed around the nation regarding this issue).

⁸ See *State Plastic and Paper Bag Legislation*, NAT'L CONF. ST. LEGISLATURES, (Nov. 1, 2019) <http://www.ncsl.org/research/environment-and-natural-resources/plastic-bag-legislation.aspx> (outlining the various acts passed around the nation regarding this issue).

⁹ See *id.* (showing that more than 28 states do not have laws about plastic bags).

¹⁰ See *id.* (providing an overview of the various cities and counties with laws about plastic bags).

¹¹ See Nick Ibarra, *Santa Cruz County Set to Ban Little Plastic Toiletry Bottles in Hotels*, TIMES STANDARD (Nov. 27, 2018), <https://www.times-standard.com/2018/11/27/santa-cruz-county-set-to-ban-little-plastic-toiletry-bottles-in-hotels/>; see also Jeremy Hobson & Allison Hagan, *Marriott CEO Says Cutting Out Single-Use Toiletries Will Save 500 Million Plastic Bottles Per Year*, WBUR (Sept. 23, 2019), <https://www.wbur.org/hereandnow/2019/09/23/marriott-hotel-cut-plastic-bottles> (examining the positive economic impacts of moving away from smaller single-use toiletries).

¹² See David Funkhouser, *Banning Plastic Bags, Town By Town: A Guide*, COLUM. U. EARTH INST.: ST. PLANET (Feb. 20, 2019), <https://blogs.ei.columbia.edu/2019/02/20/banning-plastic-bags-town-guide/> (giving an overview of the various measures employed by localities to fight plastic bag usage).

¹³ See David Lombardo, *New York Lawmakers Propose End to Single-Use Plastic Hotel Toiletries*, TIMES UNION (Sept. 18, 2019), <https://www.timesunion.com/news/article/New-York-Lawmakers-propose-end-to-single-use-14449589.php>.

¹⁴ See Jared Paben, *Here's What Is (and Isn't) Becoming Law in California*, PLASTICS RECYCLING UPDATE (Oct. 16, 2019), <https://resource-recycling.com/plastics/2019/10/16/heres-what-is-and-isnt-becoming-law-in-california/> (summarizing the new law in California).

¹⁵ See *City of Laredo v. Laredo Merchs. Ass'n*, 550 S.W.3d 586, 595, 598 (Tex. 2018) (finding that an attempt by the Laredo county government would have been an attempt to regulate solid waste in the county which was preempted by the Solid Waste statute); *Fla. Retail Fed'n, Inc. v. City of Coral Gables*, No. 3D17-0562, 2019 Fla. Dist. Ct. App. WL 3807999, at *7 (finding local governments were preempted by state statute from instituting laws concerning plastic materials).

¹⁶ See *Colo. Union of Taxpayers Found. v. City of Aspen*, 418 P.3d 506, 515-16 (Colo. 2018).

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See COLO. REV. STAT. § 25-17-104 (2017); see also Tamara Chuang, *Colorado's Ban on Banning Plastics has Cities' Plans to Outlaw Single-Use Bags and Straws in Limbo*, COLO. SUN (Mar. 7, 2019), <https://coloradosun.com/2019/03/07/colorado-plastic-ban-law-cities/>.

²⁰ See § 25-17-104; Kyle Kuphal, *Plastic Bags No Longer Allowed in Recycling*, PIPESTONE CTY. STAR (Oct. 2, 2019), <https://www.pipestonestar.com/articles/plastic-bags-no-longer-allowed-in-recycling/> (examining the lack of market for plastic bags in recycling); see also Chuang *supra* note 18; See generally Sandra Laville, *Single-Use Plastics a Serious Climate Change Hazard, Study Warns*, GUARDIAN (May 15, 2019) <https://www.theguardian.com/environment/2019/may/15/single-use-plastics-a-serious-climate-change-hazard-study-warns> (detailing the dangers of single-use plastics).

²¹ See *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (extending interstate commerce).

²² See U.S. CONST. art. 1, § 8, cl. 3.

²³ See Microbead-Free Waters Act, Pub. L. No. 114-114, § 2(c), 129 Stat. 3129 (2015); Safe Drinking Water Act, 42 U.S.C. § 300f et seq. (1974).

²⁴ *Early Implementation of the Safe Drinking Water Act of 1974, Chapter 1: The Major Elements of the Legislation and their Historical Context*, 1, 3, <https://www.epaalumni.org/userdata/pdf/6014106B36AE81EB.pdf#page=3> (covering the history behind the Safe Drinking Water Act).

²⁵ See *id.* at 4.

²⁶ See *id.*

²⁷ See 40 CFR §141 (2003).

²⁸ See Sarah Kettenmann, *Nationwide Ban on Plastic Microbeads in Cosmetics*, 31 NAT. RESOURCES & ENV'T 58, 59 (2016).

²⁹ See *id.* at 58-59.

³⁰ See *id.*